
In the United States
Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

KENNETH E. BANKS,
Appellee.

Upon Appeal from the United States District Court
for the District of Oregon

Transcript of Record

Names and address of Attorneys of Record:
GEORGE NEUNER,
United States Attorney,
CHAS. W. ERSKINE,
Assistant United States Attorney,
Federal Building, Portland, Oregon.
For Appellant.
B. A. GREEN,
Corbett Building, Portland, Oregon.
For Appellee.

FILED

AUG 22 1929

PAUL P. O'BRIEN,
CLERK

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Federal Building, Portland, Oregon.

For Appellant.

B. A. GREEN,

Corbett Building, Portland, Oregon.

For Appellee.

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

REPORT

NO. 100

1950

BY

J. R. OPPENHEIMER

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff, }
vs. }
United States of American, Defendant. }

CITATION ON APPEAL

United States of America, }
District of Oregon } ss.

TO KENNETH E. BANKS and his Attorney,
B. A. GREEN, GREETING:

WHEREAS the United States of America has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered in the District Court of the United States for the District of Oregon in your favor and has given the security required by law; you are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereto to show cause, if any there be, why the judgment should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland in said District this 2nd day of August in the year of our

Lord One Thousand Nine Hundred Twenty-nine.

JOHN H. McNARY,

Judge.

United States of America, }
District of Oregon }ss.

Due and legal service of the within CITATION ON APPEAL is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of August, 1929, by receiving a copy thereof, duly certified to as a correct copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. GREEN,

Attorney for Plaintiff.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Aug. 2, 1929

G. H. Marsh, Clerk

HSK

In the District Court of the United States for the District of Oregon, November Term, 1928.

Be It Remembered, That on the 13th day of December, 1928, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint in words and figures as follows, to-wit:

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant. }

Comes now the plaintiff and for cause of action against the defendant complains and alleges:

I.

Plaintiff is now a resident and inhabitant of the State of Oregon and a citizen of the United States of America.

II.

That heretofore and during the year 1917 plaintiff served with the military forces of the United States of America and on the 16th day of November, 1917 made application for and received a policy of war risk insurance in the sum of \$10,000.00, conditioned that the said defendant would pay to the plaintiff the sum of \$57.50 per month should he become permanently and totally disabled, as defined by law: that thereafter the premiums were paid upon said policy to and including the month of August, 1919, and thereafter under date of February 16, 1927 said plaintiff executed an application for reinstatement of the full amount of his lapsed war risk term insurance and a conversion of the same to a five

year convertible term policy, all as made and provided by law.

III.

That at the time of his application for a reinstatement and at the time of the conversion of said policy, he was suffering from a disability resulting from service, from which he was receiving compensation; that with said application and at the time thereof, plaintiff complied with all the rules and regulations of the Veterans Bureau with respect to physical examinations and plaintiff made demand as provided by law for the conversion of said policy and was informed by said defendant, thru its physicians and surgeons, and believed, and therefore alleges that at the time of said conversion of said policy he was suffering a degree of disability less than permanent, total; and plaintiff made payment of the back premiums on his said policy with interest at five per cent. per annum, as provided by law. That thereafter upon said application for reinstatement and conversion there was issued to plaintiff a \$10,000.00 Five Year Convertible Term Policy.

IV.

That after the date of reinstatement of said policy plaintiff's condition deteriorated on account of the disease from which he was then suffering, to-wit, valvular heart disease, mitral insuf-

ficiency, non-compensating, and on and during the month of July, 1927 and under orders of the defendant, plaintiff was examined and his condition was found to be one of permanent and total disability, as of July 8, 1927, and plaintiff alleges that his condition upon July 8, 1927 was that of one permanently and totally disabled, and alleges that this condition will continue thruout his life.

V.

That after the date of re-instatement and conversion of said policy, plaintiff paid the monthly premiums due on his policy, as provided by law, until and about the month of July, 1927 at which time he was advised by said defendant that he was permanently and totally disabled and that further payments on his converted policy need not be made.

VI.

That thereafter and subsequent to the allowance to said plaintiff of the award of permanent and total disability, the defendant failed and refused and now fails and refuses to pay said plaintiff under the terms and pursuant to the provisions of the said converted policy, and has disagreed with said plaintiff as to his claim and now disagrees with plaintiff.

WHEREFORE, plaintiff prays for judgment

and decree of this court that he was on the 8th day of July, 1927 permanently and totally disabled and will ever be, and that he recover from said defendant pursuant to the terms and conditions of said policy, as in this complaint described, and for plaintiff's costs and disbursements incurred herein.

B. A. GREEN,
Attorney for Plaintiff.

State of Oregon, }
County of Multnomah } ss.

I, Kenneth E. Banks, being first duly sworn, depose and say that I am plaintiff in the above entitled cause; and that the foregoing Complaint is true as I verily believe.

KENNETH E. BANKS.

Subscribed and sworn to before me this 12th day of December, 1928.

B. A. GREEN,
Notary Public for Oregon.

(SEAL) My Commission expires Nov 7, 1932.

State of Oregon, }
County of Multnomah } ss.

Due service of the within complaint is hereby accepted in Multnomah County, Oregon, this day of December, 1928, by receiving a copy

thereof, duly certified to as such by B. A. Green, attorney for plaintiff.

GEORGE NEUNER,
Attorney for Defendant.

And afterwards, to-wit, on the 8th day of April, 1929 there was duly filed in said Court, a Stipulation in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff,	}
vs.	
United States of America, Defendant.	

STIPULATION

IT IS HEREBY STIPULATED by and between B. A. Green, attorney for plaintiff, and Charles W. Erskine, Assistant United States Attorney for the District of Oregon, that the following may be stricken from plaintiff's complaint on file herein:

Paragraph III, Page 2, beginning on Line 5 and ending on Line 6, the following:

“and was informed by said defendant, through its physicians and surgeons.”

Paragraph V, Page 2, beginning on Line 28 and ending on Line 30, the following:

“he was advised by said defendant that

he was permanently and totally disabled and that further payments on his converted policy need not be made.”

Dated at Portland, Oregon, this 8th day of April, 1929.

B. A. GREEN,

Attorney for Plaintiff.

CHAS. W. ERSKINE,

Assistant United States Attorney.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Apr. 8, 1929

G. H. Marsh, Clerk

B

And afterwards, to-wit, on Monday, the 8th day of April, 1929, the same being the 27th judicial day of the regular March Term of said Court, present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff,

vs.

United States of America, Defendant.

}
}
}

ORDER TO STRIKE

This matter coming on to be heard on the stipulation heretofore filed herein, the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the following be, and the same is hereby, stricken from the complaint on file herein:

From Paragraph III, Page 2, beginning on Line 5 and ending on Line 6, the following:

“and was informed by said defendant, through its physicians and surgeons.”

From Paragraph V, Page 2, beginning on Line 28 and ending on Line 30, the following:

“He was advised by said defendant that he was permanently and totally disabled and that further payments on his converted policy need not be made.”

Dated at Portland, Oregon, this 8th day of April, 1929.

JOHN H. McNARY,
District Judge.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Apr. 8, 1929

G. H. Marsh, Clerk

And afterwards, to-wit, on the 8th day of April, 1929 there was duly filed in said Court, an Answer in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff,	}
vs.	
United States of America, Defendant.	

ANSWER

COMES NOW the United States of America, by George Neuner, United States Attorney for the District of Oregon, and Chas. W. Erskine, Assistant United States Attorney, and for answer to plaintiff's complaint herein, admits, denies, and alleges as follows:

I.

Alleges that defendant has no knowledge or information sufficient to form a belief relative to the allegations contained in Paragraph I of plaintiff's complaint, and therefore denies the same.

II.

Admits each and every allegation contained in Paragraph II of plaintiff's complaint.

III.

Denies each and every allegation contained in

Paragraph III of plaintiff's complaint.

IV.

Denies each and every allegation contained in Paragraph IV of plaintiff's complaint, except that it is admitted that the plaintiff was permanently and totally disabled on the 8th day of July, 1927.

V.

Denies each and every allegation contained in Paragraph V of plaintiff's complaint.

VI.

Admits each and every allegation contained in Paragraph VI of plaintiff's complaint.

For a further and separate answer and defense to plaintiff's complaint, defendant alleges:

I.

That heretofore, and on the 16th day of November, 1917, plaintiff made application for and received a policy of war risk insurance in the sum of Ten Thousand (\$10,000) Dollars, conditioned that the said defendant would pay to the plaintiff the sum of Fifty-Seven and 50/100 (\$57.50) Dollars per month, should he become permanently and totally disabled as defined by law, that said policy lapsed for non-payment of premiums on the 1st day of September, 1919, and that thereafter, under date of February 16, 1927, said plain-

tiff applied for reinstatement and conversion of the full amount of his said lapsed war risk term insurance, and that said application was tentatively accepted by the Director of the United States Veterans Bureau and a five-year convertible policy of government life insurance was tentatively issued to plaintiff, effective March 1, 1927.

II.

That at the time plaintiff filed said application and at the time the same was tentatively accepted and granted, plaintiff was suffering from disability due to his military service, and was rated less than permanently and totally disabled, by the United States Veterans Bureau.

III.

That under the provisions of Section 304 of the World War Veterans Act, and regulations promulgated thereunder, plaintiff, to be entitled to reinstate or reinstate and convert his said war risk insurance, among other things, was required to submit proof satisfactory to the Director of the Veterans Bureau that he was not permanently and totally disabled.

IV.

That at the time plaintiff filed his said application, as aforesaid, and at the time the same was tentatively accepted and granted, the evidence

submitted to the Director of the Veterans Bureau by plaintiff and in the possession of said Director was insufficient to show to the satisfaction of said Director that plaintiff was not permanently and totally disabled; that plaintiff was therefore re-examined by the Veterans Bureau, and on the 9th day of July, 1927, was rated permanently and totally disabled as of July 8, 1927; that, as a result of said examination, it was subsequently, and on the 12th day of June, 1928, finally determined that the plaintiff was permanently and totally disabled from the 23rd day of February, 1926.

V.

That by reason of the fact that plaintiff was permanently and totally disabled at the time he filed his said application for reinstatement and conversion, as aforesaid, and at the time the same was tentatively accepted and a five-year convertible policy of government life insurance tentatively issued to him, plaintiff was not entitled either to reinstate or to convert his war risk insurance, and the action of the Veterans Bureau in tentatively reinstating said war risk insurance and tentatively issuing said policy was contrary to law, and void, and plaintiff had no war risk insurance or government life insurance in force and effect at any time subsequent to September 1, 1919.

VI.

That on the 23rd day of June, 1928, plaintiff was advised that the action of the Veterans Bureau in reinstating and converting said insurance was erroneous, contrary to law, and void, and that the same had been cancelled; that, upon cancelling the said reinstatement and conversion, the Veterans Bureau at a later date returned all the premiums tendered by plaintiff by reason of plaintiff's said reinstatement and conversion of his war risk insurance.

WHEREFORE, Defendant, having fully answered plaintiff's complaint, demands that plaintiff take nothing thereby and that defendant go hence without day and recover of and from plaintiff its costs and disbursements herein.

GEORGE NEUNER,

United States Attorney for the
District of Oregon.

CHAS. W. ERSKINE,

Assistant United States Attorney.

United States of America, }
District of Oregon } ss.

I, Chas. W. Erskine, being first duly sworn, depose and say: That I am a duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that I am

possessed of information regarding the above-named plaintiff, from which I have prepared the foregoing ANSWER, and that the allegations contained in said ANSWER are true, as I verily believe.

CHAS. W. ERSKINE.

Subscribed and sworn to before me this 6th day of April, 1929.

J. W. McCULLOCH,
Notary Public for Oregon.

(SEAL) My commission expires Dec. 23, 1930.

United States of America, }
District of Oregon }ss.

Due and legal service of the within ANSWER is hereby admitted and accepted in the State and District of Oregon, this 6th day of April, 1929, by receiving a copy thereof, duly certified to be a true and correct copy of the original, by Chas. W. Erskine, Assistant United States Attorney.

B. A. GREEN,
Attorney for Plaintiff.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Apr. 8, 1929

G. H. Marsh, Clerk

And afterwards, to-wit, on the 10th day of April, 1929, there was duly filed in said Court, a Demurrer in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff,	}
vs.	
United States of America, Defendant.	

DEMURRER

COMES NOW the plaintiff and files this as a demurrer to the further and separate answer and defense of the defendant filed herein, on the ground and for the reason that the things and matters therein set forth do not constitute a defense to the cause of action as alleged in plaintiff's complaint.

B. A. GREEN,

Attorney for plaintiff.

Service accepted this 10th day
of April, 1929.

J. W. McCULLOCH,

Of attorneys for defendant.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Apr. 10, 1929

G. H. Marsh, Clerk

And afterwards, to-wit, on Wednesday, the 17th day of April, 1929, the same being the 34th judicial day of the regular March Term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff,	}
vs.	
United States of America, Defendant.	

ORDER

This cause having come on to be heard before the Hon. Robert S. Bean, Judge of the above entitled court, upon this, the 15th day of April, 1929, upon a demurrer as filed by the plaintiff to the answer of the defendant on the ground and for the reason that the same failed to state facts sufficient to constitute a defense to the cause of action alleged in plaintiff's complaint, plaintiff appearing in court at this time by his attorney, B. A. Green, and defendant appearing in court by Charles W. Erskine, Assistant United States Attorney, and the court being advised in the premises,

IT IS ORDERED AND ADJUDGED that said demurrer be and the same is hereby sustained,

and said defendant is given ten (10) days to further answer and plead herein.

AND IT IS SO ORDERED.

Dated this 17th day of April, 1929.

R. S. BEAN,
Judge.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Apr. 17, 1929

G. H. Marsh, Clerk

And afterwards, to-wit, on the 8th day of May, 1929 there was duly filed in said Court, a Stipulation in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff, }
vs. }
United States of America, Defendant. }

STIPULATION

IT IS HEREBY STIPULATED by and between Chas. W. Erskine, Assistant United States Attorney for the District of Oregon, who appears on behalf of the defendant, and B. A. Green, Attorney for the Plaintiff herein, that the above-entitled case may be tried and determined by the Court without

the intervention of a jury.

CHAS. W. ERSKINE,

Assistant United States Attorney
for the District of Oregon,
Attorney for Defendant.

B. A. GREEN,

Attorney for Plaintiff.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed May 8, 1929

G. H. Marsh, Clerk

K

And afterwards, to-wit, on Wednesday, the 8th day of May, 1929, the same being the 51st judicial day of the regular March Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff,

vs.

United States of America, Defendant.

}
}
}

JUDGMENT

This cause coming on for trial before the Hon. Judge McNary, Judge of the above entitled Court,

upon the 8th day of May, 1929, being the day regularly set therefor, and said plaintiff and defendant having heretofore stipulated in writing, which stipulation was duly filed with the Clerk, that a jury be waived in said cause, and that the matter be heard before the court without the intervention of a jury, and the Court having heard the opening statement of the respective counsel, and having heard the testimony on behalf of the plaintiff, defendant waiving testimony to be produced, the Court does find and enter its verdict that plaintiff was on said 8th day of July, 1927, permanently and totally disabled, and that said re-instated and converted policy was, on said 8th day of July, 1927, in full force and effect:

THEREFORE, based upon said finding and said verdict;

IT IS ORDERED AND ADJUDGED that plaintiff do have and recover judgment against the defendant for the sum of \$57.50 per month from July 8th, 1927, in all the sum of \$1265.00, and that plaintiff receive such payments thereunder as made and provided by law, and the Court does find that \$1000.00 is a reasonable sum to be allowed B. A. Green as attorney for plaintiff in said cause.

AND IT IS SO ORDERED.

Dated this 8th day of May, 1929.

JOHN H. McNARY,

Judge.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed May 8, 1929

G. H. Marsh, Clerk

K

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, a Petition for Order of Appeal in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff,

vs.

United States of America, Defendant.

}
}

PETITION FOR ORDER OF APPEAL

The above-named defendant, United States of America, conceiving itself aggrieved by the judgment filed and entered on the 8th day of May, 1929, in the above-entitled action does hereby appeal from said judgment and the whole thereof to the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the reason and upon the ground specified in the assignments of error

filed herewith and prays that this, its appeal, be allowed; that a citation issue as provided by law and that a transcript of the record and proceedings in said cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit sitting at San Francisco, California.

Dated at Portland, Oregon, this 1st day of August, 1929.

GEORGE NEUNER,

United States Attorney for the
District of Oregon

FRANCIS E. MARSH,

Assistant United States Attorney.

United States of America, }
District of Oregon } ss.

Due and legal service of the within PETITION FOR ORDER OF APPEAL is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of August, 1929, by receiving a copy thereof duly certified to as a true and correct copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. GREEN,

Attorney for Plaintiff.

Endorsed:

U. S. DISTRICT COURT

District of Oregon
 Filed Aug. 2, 1929
 G. H. Marsh, Clerk
 HSK

And afterwards to-wit on Friday the 2nd day of August, 1929, the same being the 24th judicial day of the regular July Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

L-10474

In the District Court of the United States for the
 District of Oregon

Kenneth E. Banks, Plaintiff, }
 vs. }
 United States of America, Defendant. }

ORDER ALLOWING APPEAL

UPON THE PETITION of the United States of America, defendant in the above-entitled cause, IT WAS ORDERED that the appeal of said defendant from the judgment herein to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby allowed.

Dated at Portland, Oregon, this 2nd day of August, 1929.

JOHN H. McNARY,
 Judge.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Aug. 2, 1929

G. H. Marsh, Clerk

HSK

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, a Notice of Appeal in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff, }

vs. }

United States of America, Defendant. }

NOTICE OF APPEAL

TO THE ABOVE-NAMED PLAINTIFF, KENNETH E. BANKS, and his Attorney, B. A. GREEN:

You and each of you will take notice that the defendant, United States of America, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment and decree made and entered in the above-entitled cause and Court and signed by Honorable John H. McNary, one of the Judges of said District Court,

on the 8th day of May, 1929, which judgment and decree were and are to the effect that plaintiff herein, Kenneth E. Banks, became totally and permanently disabled on the 8th day of July, 1927, and ever since said date has been and now is permanently and totally disabled and that there is due and owing said Kenneth E. Banks on a policy of Converted Insurance carried by said plaintiff, a sum equal to the accrued payments of \$57.50 per month from the 8th day of July, 1927, being in all the sum of \$1265.00, and the defendant appeals from the whole of said judgment and decree.

Dated this 2nd day of August, A. D., 1929.

GEORGE NEUNER,

United States Attorney for the
District of Oregon.

FRANCIS E. MARSH,

Assistant United States Attorney.

United States of America, }
District of Oregon } ss.

Due and legal service of the within NOTICE OF APPEAL is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of Aug. 1929, by receiving a copy thereof duly certified to as a true and correct copy of the original by Francis E. Marsh, Assistant United

States Attorney for the District of Oregon.

B. A. GREEN,

Attorney for Plaintiff.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Aug. 2, 1929

G. H. Marsh, Clerk

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, Assignments of Error in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff,

vs.

United States of America, Defendant. }

ASSIGNMENTS OF ERROR

The United States of America being the defendant in the above-entitled cause and appearing by George Neuner, United States Attorney for the District of Oregon, and Francis E. Marsh, Assistant United States Attorney, and having filed a Notice of Appeal as required by law, that the defendant appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final

order and judgment made and entered in said cause against said defendant herein, now makes and files in support of said appeal the following assignments of error upon which it will rely for a reversal of said final order and judgment upon the said appeal, and which said error is to the great detriment, injury and prejudice of this defendant, and said defendant says that in the records and proceedings upon the hearing and determination thereof in the District Court of the United States for the District of Oregon, there is a manifest error in this, to-wit:

I.

That the Court erred in sustaining the demurrer of the plaintiff to the further and separate answer and defense contained in defendant's answer to plaintiff's complaint.

II.

That the Court erred in denying the admission of proof to substantiate the allegations contained in defendant's further and separate answer as appear in Exception Number I.

WHEREFORE, on account of the error above assigned, the defendant prays that the judgment of this Court be reversed and that this cause be remanded to the said District Court and that such directions be given that the above errors may be

corrected and law and justice be done in the matter.

Dated at Portland, Oregon, this 2nd day of August, 1929.

GEORGE NEUNER,

United States Attorney for the
District of Oregon.

FRANCIS E. MARSH,

Assistant United States Attorney.

United States of America, }
District of Oregon }ss.

Due and legal service of the within ASSIGNMENTS OF ERROR is hereby admitted and accepted within the State and District of Oregon, on the 2nd day of August, 1929, by receiving a copy thereof duly certified to as a true and correct copy of the original by Francis E. Marsh, Assistant United States Attorney for the District of Oregon.

B. A. GREEN,

Attorney for Plaintiff.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Aug. 2, 1929

G. H. Marsh, Clerk

HSK

And afterwards, to-wit, on the 2nd day of August, 1929 there was duly filed in said Court, a Bill of Exceptions in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff,	}
vs.	
United States of America, Defendant.	

BILL OF EXCEPTIONS

BE IT REMEMBERED that the above-entitled case came on to be heard before the Honorable John H. McNary, Judge of the above-entitled Court, on the 8th day of May, 1929, without a jury and the plaintiff being represented by his attorney, B. A. Green, and the defendant by its attorney, Chas. W. Erskine, Assistant United States Attorney for the District of Oregon.

WHEREUPON, the following proceedings, among others were had:

MR. GREEN: Now may it please the Court, I want to make this statement for the record, and I understand that this will be agreed to by counsel for the Government. What counsel for the plaintiff and counsel for the defendant desire in this case

is that the record shall be in such shape that there shall be presented to the Circuit Court of Appeals only the questions as to the legality or the rightfulness of the rulings made by Judge Bean with respect to the demurrer. Is that right?

MR. ERSKINE: That is correct.

THE COURT: Then I should think that should be very easily arranged by stipulation.

MR. GREEN: And it is further agreed now that where the answer of the defendant in the case of Kenneth E. Banks vs. United States of America denies all of Paragraph III thereof, it is now stipulated that the last five lines of said paragraph III of plaintiff's complaint may be taken as admitted, these lines reading as follows: "And plaintiff made payment of the back premiums on his said policy with interest at five per cent per annum, as provided by law. That thereafter upon said application for reinstatement and conversion there was issued to plaintiff a \$10,000.00 Five Year Convertible Term Policy." Is that so stipulated, Mr. Erskine? I read from my complaint, Paragraph III.

MR. ERSKINE: Yes, except that defendant desires to stipulate only that the policy was tentatively issued.

MR. GREEN: Plaintiff rests, Your Honor, with the stipulation in the record as it now stands.

MR. ERSKINE: At this time the defendant desires to offer proof to substantiate the allegations contained in its further and separate answer in this case.

THE COURT: One further and separate answer, is there?

MR. ERSKINE: Yes.

MR. GREEN: At this time, Your Honor, the plaintiff objects to the offer of proof as to any matter or thing contained in the first further and separate answer and defense, there being only one separate answer and defense, on the ground and for the reason that the evidence is wholly incompetent, irrelevant, and immaterial and not tending to prove or disprove any issue in this cause, and specifically upon the ground that heretofore and with respect to said further and separate answer and upon the same having been filed, a demurrer was

filed to said further and separate answer by the plaintiff herein, which demurrer was argued and authorities submitted to Judge Bean of this court and the demurrer was sustained, and thereafter an order was entered striking said further and separate answer from the files of this cause, upon the ground and for the reason that the same did not state facts sufficient to constitute a defense to the plaintiff's cause of action, and based upon said order and said ruling with respect to said demurrer there is no issue tendered by the pleadings in this cause that would warrant the Court in receiving any evidence in substantiation with respect to the offer of proof.

THE COURT: In view of the ruling of Judge Bean upon the demurrer I will sustain the objection.

MR. ERSKINE: And the Court will allow an exception?

THE COURT: An exception is taken and allowed.

IT IS HEREBY CERTIFIED that the foregoing proceedings were had upon the trial in this cause, and that the Bill of Exceptions contains all the evi-

dence relative to or necessary to an understanding of the foregoing objection and exception.

IT IS FURTHER CERTIFIED that the foregoing exception asked or taken by the defendant was allowed by the Court and this Bill of Exceptions was duly presented and filed within the time fixed by law and the orders of this Court and is by me duly allowed and signed this 2nd day of August, 1929.

JOHN H .McNARY,

One of the Judges of the District
Court of the United States for the
District of Oregon.

O. K.

B. A. GREEN,

Attorney for Plaintiff.

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Aug. 2, 1929

G. H. Marsh, Clerk

HSK

And afterwards, to-wit, on the 2nd day of August, 1929, there was duly filed in said Court, a Stipulation in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the
District of Oregon

Kenneth E. Banks, Plaintiff,
vs.
United States of America, Defendant.

}

STIPULATION

IT IS HEREBY STIPULATED by and between the respective parties to the above-entitled action that the record and transcript to be prepared by the Clerk of the Court and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit shall consist of the following:

Citation on Appeal

Complaint

Stipulation

Order to Strike

Answer

Demurrer

Order Sustaining Demurrer

Stipulation Waiving Jury

Judgment

Petition for Order of Appeal

Order Allowing Appeal

Notice of Appeal

Assignments of Error with Endorsements
thereon

Bill of Exceptions with Endorsements thereon

This Stipulation

Praecipe for Record to be Prepared by Clerk

B. A. GREEN,

Attorney for Plaintiff

FRANCIS E. MARSH,

Assistant United States Attorney

for the District of Oregon

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Aug. 2, 1929

G. H. Marsh, Clerk

HSK

And afterwards, to-wit, on the 2d day of August, 1929, there was duly filed in said Court, a Praecipe in words and figures as follows, to-wit:

L-10474

In the District Court of the United States for the District of Oregon

Kenneth E. Banks, Plaintiff,

vs.

United States of America, Defendant.

}
}
}

PRAECIPE

To the Clerk of the Above-Entitled Court:

You are hereby directed to please prepare and certify the record in the above cause for transmission to the United States Circuit Court of Ap-

peals for the Ninth Circuit, including therein a certified copy of all papers filed and proceedings had in the above-entitled cause, which are necessary to a determination thereof in said appellate Court and especially including therein the following documents:

Citation on Appeal

Complaint

Stipulation

Order to Strike

Answer

Demurrer

Order Sustaining Demurrer

Stipulation Waiving Jury

Judgment

Petition for Order of Appeal

Order Allowing Appeal

Notice of Appeal

Assignments of Error with Endorsements

thereon

Bill of Exceptions with Endorsements thereon

Stipulation

This Praeceptum for Record to be prepared by
Clerk

Dated at Portland, Oregon, this 2nd day of
August, 1929.

FRANCIS E. MARSH,

Assistant United States Attorney

Endorsed:

U. S. DISTRICT COURT

District of Oregon

Filed Aug. 2, 1929

G. H. Marsh, Clerk

K

